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IN THE

Supreme Court of the United States

ABIGAIL NOEL FISHER,

Petitioner,

v.

THE UNIVERSITY OF TEXAS AT AUSTIN, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE FOR RICHARD LEMPERT IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Richard Lempert retired from the University of Michigan, as the Eric Stein Distinguished University Professor of Law and Sociology, having chaired the Sociology Department and served on leave as the Division Director for the Social and Economic Sciences at the National Science Foundation. In these positions he worked to promote the fair and intelligent use of social science evidence by agencies and courts, writing frequently on this topic. Reading briefs submitted in this case, he believes the Court is at risk of being misled about the state of relevant social science and seeks to caution the Court against relying on claims that lack a sound empirical foundation.

SUMMARY OF ARGUMENT

There is considerable writing on academic mismatch and on whether colleges and universities can through class-based affirmative action achieve the racial and ethnic diversity

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[1] Pursuant to the Court's Rule 37.3(a), all parties have consented to the filing of this brief by filing blanket consents with the Clerk. Pursuant to Rule 37.6, Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund this brief's preparation or submission. No person other than Amicus made a monetary contribution to its preparation or submission.

that this Court, in an unbroken string of cases, has recognized as a compelling state interest. *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978), *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013). In the current case, mismatch receives its most extensive treatment in the Amicus Brief submitted by Richard Sander, while the argument that class-based affirmative action can adequately substitute for race-sensitive admissions is most forcefully advanced in the brief submitted by Richard Kahlenberg. In each brief the extant literature is not correctly characterized. The overwhelming weight of reliable evidence indicates that academic overmatch (attending a school where one's academic credentials are below those of most students; hereinafter "mismatch") has few, if any, adverse effects on minority students and quite likely enhances their prospects for graduation and job success. Moreover, some studies that proponents of the mismatch hypothesis heavily rely on are so fundamentally flawed that they offer the Court nothing of value.

Class-based preferences may deserve consideration for their own sake, but extant research, simple demographics and financial costs mean that they not only cannot replace race sensitivity as a tool for creating educationally valuable racial and ethnic diversity, but also that reliance on them would,

on average, lower the academic qualifications of admitted students.

ARGUMENT

I. The empirical evidence does not support assertions that minority students as a group, and African Americans in particular, suffer from academic mismatch when selective colleges and universities use race as a factor in choosing whom to admit. Conclusions to this effect in analyses of law school performance have been rejected by most social scientists who have examined the data, and key studies are fatally flawed by mistaken assumptions. Analyses focusing on undergraduates almost universally link no adverse mismatch effects to affirmative action and often report beneficial results.

A. Contrary to Professor Sander's assertions, the evidence suggesting educators should be concerned about mismatch has grown weaker rather than stronger since Professor Sander first addressed the issue. *See* Richard Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 Stan. L. Rev. 367 (2004) [hereinafter Sander, *Systemic Analysis*]. Only by failing to acknowledge most relevant studies and by making misleading arguments does Sander manage to give the impression that the mismatch hypothesis is a widely accepted truth. Although Sander's brief cites his original article as if it were strong evidence favoring

mismatch, in responding to critics of that article, he acknowledged fundamental flaws that undermine his analysis, including the fuzziness of the tier system developed for the Bar Passage Study (BPS) and a misspecified model. *See* Richard Sander, *A Reply to Critics*, 57 Stan. L. Rev. 1963, 1969 (2005) [hereinafter Sander, *Reply*]. Moreover, some of the country's most eminent statistical methodologist have declared his method fundamentally flawed. *See* Brief of Empirical Scholars as Amici Curiae in Support of Respondents, *Fisher v. University of Texas*, 133 S. Ct. 2411 (2013) (No. 11-345). Nonetheless Sander cites his work as if his findings are generally accepted and have withstood criticism. In *Reply supra*, Sander tried to rehabilitate his original piece with a new analysis, but this too is seriously flawed. *See* Richard Lempert, William Kidder, Timothy Clydesdale & David Chambers, *Affirmative Action in American Law Schools: A Critical Response to Richard Sander's "A Reply to Critics,"* (Working paper no. 06-001, John Olin Ctr. for Law & Econ., Univ. of Michigan) (2006).[2]

Perhaps because his reply acknowledged serious shortcomings in his original analysis, Sander does not cite it in his brief, although he cites the original analysis. Sander similarly fails to reference the full range of criticisms and

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[2] *Available at* http://repository.law.umich.edu/cgi/viewcontent.cgi?article=1061&context=law_econ_archive.

failures to replicate that his original work received, doing no more than tossing out the names of a few critics. Thus one would not know from a brief ostensibly offered to aid the Court that numerous articles examining the same data Sander used criticize his methods or question his results. *See* Daniel E. Ho, *Scholarship Comment: Why Affirmative Action Does Not Cause Black Students to Fail the Bar*, 114 Yale. L.J. 1997 (2005); Daniel E. Ho, *Affirmative Action's Affirmative Actions: A Reply to Sander*, 114 Yale L.J. 2011 (2005); Ian Ayres & Richard Brooks, *Does Affirmative Action Reduce the Number of Black Lawyers?*, 57 Stan. L. Rev. 1807 (2005); David L. Chambers, Timothy T. Clydesdale, William C. Kidder & Richard O. Lempert, *The Real Impact of Eliminating Affirmative Action in American Law Schools: An Empirical Critique of Richard Sander's Study*, 57 Stan. L. Rev. 1855 (2005) [Hereinafter Chambers et al.]; Gregory Camilli, Darrell D. Jackson, Chu Chia-Yi & Ann Gallagher, *The Mismatch Hypothesis in Law School Admissions*, 2 Widener J.L. Econ. & Race 165 (2011); Gregory Camilli & Kevin G. Welner, *Is There a Mismatch Effect in Law School, Why Might It Arise, and What Would It Mean?* 37 J.C. & U.L. 491 (2011); Jesse Rothstein & Albert H. Yoon, *Affirmative Action in Law School Admissions: What Do Racial Preferences Do?*, 75 U. Chi. L. Rev. 649 (2008)); Alice Xiang & Donald Rubin, *Assessing the Potential Impact of a Nationwide Class-Based Affirmative Action System*, 30 Stat. Sci. 297 (2015). [Hereinafter

Xiang & Rubin]. Sander's mismatch claims, assumptions and methods have also been questioned by scholars who review Sander's work but do not reanalyze his data. *See e.g.*, Michele Landis Dauber, *The Big Muddy*, 57 Stan. L. Rev. 1899 (2005); William C. Kidder & Angela Onwuachi-Willig, *Still Hazy After All These Years: The Data and Theory Behind "Mismatch,"* 92 Tex. L. Rev. 895 (2014); David B. Wilkins, *A Systematic Response to Systemic Disadvantage: A Response to Sander*, 57 Stan. L. Rev. 1915 (2005).

Sander's law school "mismatch" work further suffers because it rests on a mistaken assumption unremarked by Sander and others (myself included) who have analyzed the BPS data. Analyses have proceeded on the assumption that although the boundaries between the 6 BPS tiers may be fuzzy, the schools are ordered so that in each tier schools have, on average, reliably higher academic index scores than schools below them. The procedure used to create the tiers did not, however, ensure such ordering, and the assumption of a reliable index score hierarchy fails in two important instances. The mean index score of schools in tier 3 is not significantly below the mean of the tier 2 schools, and there is almost no difference between each tier's typical (or centroid) school. *See* Linda F. Wightman, *Clustering U.S. Law Schools Using Variables That Describe Size, Cost, Selectivity, and Student Body*

Characteristics (LSAC Research Rep. No. 93-04, 1993) [hereinafter Wightman, *Clustering*]. The tiers' statistical indistinguishability is particularly problematic because the characteristics that do distinguish the tiers would lead one to expect that, holding index scores constant, tier 3 African Americans will do better in making it to and through the bar than their tier 2 counterparts. Tier 3 schools are, as a group, somewhat more selective than those in tier 2, cost far less to attend, and have better student faculty ratios. If, as is the case, African Americans in these schools do better, controlling for credentials, than their tier 2 counterparts, lesser mismatch is not the reason.

Sander's studies and other studies using his tier structure are further biased because the mean index score of his tier 6 African American students is not only higher than the tier 5 mean, but tier 6 includes only historically black law schools (HBLS). *See* Sander, *Systemic Analysis*, *supra* at 416. It is thus not surprising that, controlling for credentials, tier 6 African Americans do better in graduating and passing the bar than their tier ranking would suggest. Their schools each have far more African American students than the number needed to constitute a critical mass; except for Howard they are very low cost, they abound in same-race role models, and their graduates tend to

take the bar in states with relatively lower bar exam passing standards.[3]

These overlooked considerations affect all studies that use the BPS tier order as a proxy for academic selectivity, but no study's conclusions are rendered more suspect than the study by Doug Williams on which Sander heavily relies. *See* Doug Williams, *Do Racial Preferences Affect Minority Learning in Law Schools?*, 10 J. Empirical Legal Studies 171 (2013). It is hard to imagine a study better designed to take account of the idiosyncrasies of the BPS tier structure in order to find mismatch. In the models central to his study,[4] Williams first eliminates more than half the African Americans in the BPS sample by discarding the data for tiers 3 and 4 schools.

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[3] In 1991, the mean HBLS tuition was the lowest of any tier ($3,137), with the next lowest being the mean charge of $3,481 at tier 3 schools. Mean tuition at Tier 2 schools was $11,154. *See* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N. Y. U. L. Rev. 1, 24 (1997) [hereinafter Wightman, *Threat*].

[4] Williams offers an instrumental variable (IV) analysis to bolster his core model's results. Not only is this analysis also biased by the tier order problems described in the text, but IV methods are themselves often questionable. *See* Michael P. Murray, *Avoiding Invalid Instruments and Coping with Weak Instruments*, 20 J. Econ. Perspectives 111 (2006); *see also* James Heckman, *Instrumental Variables: A Study of Implicit Behavioral Assumptions Used in Making Program Evaluations*, 32 J. Human Resources 441 (1997).

Next he lumps together African American students at tier 1 and 2 schools although compared to tier 2 students, tier 1 students – unlike the omitted 3 students – have significantly different academic credentials. *See* Wightman, *Clustering* at 24. Finally he combines tiers 5 and 6, although about three-quarters of the African Americans in the combined tier attended an HBLS.

These design choices by Williams hide from the reader the strong performance of tier 1 African Americans, almost all of whom graduate and pass the bar, and the full story of the tier 5-6 students. To the extent that the latter fare better than expected, the effects are due to the performance of the HBLS students, who enjoy advantages unrelated to how well they are matched academically to their peers. Because Williams' results are not only derived from a biased model, but are also based on data that exclude the majority of BPS African Americans, they can play no legitimate role in the mismatch debate. It is telling that Sander chooses to rely heavily on this study to bolster his claims.[5]

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[5] Sander seeks in his brief to bolster Williams' findings by noting that the study was published in JELS, a peer reviewed journal, without later rebuttal. In fact, I and a coauthor sought to reply but were told by the JELS, editor that he did not publish replies that simply documented flaws in published articles. Similarly misleading is Sander's attempt to deflate studies criticizing his work by noting they were not published in peer reviewed journals. Sander himself avoided peer review by publishing in law

B. Moving from law school to undergraduate settings, the overwhelming weight of the evidence suggests that affirmative action, as currently practiced, does not harm minorities through academic mismatch, and may in fact benefit students who might appear overmatched.[6] If there is a mismatch problem it is that minorities are more likely to be in situations of "undermatch" – that is attending schools that are less selective than those they could be admitted to – than in situations of overmatch. *See* Caroline Hoxby & Christopher Avery, *The Missing "One-Offs": The Hidden Supply of High Achieving, Low Income Students* 1-65 (Brookings Papers Econ. Activity, 2013); William G. Bowen, Matthew M. Chingos & Michael S. McPhearson, *Crossing the Finish Line: Completing College at America's Public Universities* (2009) [Hereinafter *Finish Line*].[7]

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reviews, which established the forums for conversation. Finally, Sander cites the U.S. Commission on Civil Rights endorsement of mismatch theory as if it were a reliable scientific conclusion. He and I jointly testified before the Commission. Every Commissioner already opposed to affirmative action endorsed his arguments; those supporting affirmative action endorsed mine.

[6] This section draws heavily on William Kidder & Richard O. Lempert, *The Mismatch Myth in U.S. Higher Education: A Synthesis of Empirical Evidence at the Law School and Undergraduate Levels, in* Uma Jayakumar & Liliana M. Garces, eds., Affirmative Action and Racial Equality (2015).

[7] Bowen et al.'s data came from 21 "flagship" public universities and the public university systems in four states. The authors also looked for evidence of mismatch, but found "no support whatsoever for [the mismatch]

The seminal study is by Bowen and Bok. See William G. Bowen & Derek Bok, *The Shape of the River: Long Term Consequences of Considering Race in College and University Admissions* (1998) [Hereinafter Bowen & Bok]. Using the College and Beyond data set of 28 academically selective institutions, Bowen and Bok found, for example, that in the 1989 admissions cohort, 87% of African Americans entering the most selective tier of these selective schools (e.g., Yale and Stanford) with SAT scores in the 1100s graduated with bachelor's degrees, compared to 79% of those attending Tier 2 schools (e.g., Northwestern and Penn) and 72% of those at Tier 3 institutions (e.g., Michigan and Penn State) with similar test scores.[8] *Id.* at 61.

Other studies report similar findings. Using the broader cross-section of schools represented in the 1982 High School and Beyond longitudinal data set and focusing on African American and Latina/o students in predominantly white institutions, Kane found

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hypothesis," leading them to conclude that underrepresented minorities, would be "well advised to enroll at one of the most challenging universities that will accept them." *Finish Line, supra* at 228.

[8] The pattern was the same for African Americans with SAT scores below 1000, between 1000 and 1099, and above 1300. The only anomaly is that African Americans with SAT scores between 1200 and 1299 did better in third than in second tier schools.

that, controlling for admissions test scores, minority graduation rates correlated positively with college selectivity. *See* Thomas. J. Kane, *Racial and Ethnic Preferences in College Admissions, in* C. Jencks & M. Phillips (eds.), *The Black–White Test Score Gap* (1998). Working with College and Beyond and supplementary data, Small and Winship found "a clear benefit of Affirmative Action in elite institutions." *See* Mario L. Small & Christopher Winship, *Black Students' Graduation from Elite Colleges: Institutional Characteristics and Between-Institution Differences*, 36 Soc. Sci. Research 1257, 1272 (2007).

Here's how they describe their work:

> We ask three questions: Do institutional factors affect black students' probability of graduation? Do they account for between-institution differences in black graduation? And are institutions where blacks have a high probability of graduation the same as or different from those where whites do? Testing for the effect of eight major institutional factors, we find, surprisingly, that only selectivity has a statistically significant effect. Contrary to common belief, selectivity improves black probabilities of graduation, and helps blacks more than it helps whites.
> *Id.* at 1257.

Fischer and Massey analyzed data from the 1999 National Longitudinal Survey of Freshmen (NLSF), which added UC Berkeley to the institutions Bowen and Bok had examined. *See* Mary Fischer & Douglas S. Massey, *The Effects of Affirmative Action in Higher Education,* 36 Soc. Sci. Research, 531 (2007). Controlling for background characteristics, they looked at college GPAs and the odds of dropping out. Their estimates "provided no evidence whatsoever for the mismatch hypothesis." Rather their data suggest that, "[M]inority students who benefited from affirmative action earned higher grades and left school at lower rates than others, and they expressed neither greater nor less satisfaction with college life in general." *Id.* at 544. In addition, they looked specifically at whether greater distance ("mismatch") between minority students' SAT scores and their schools' median SAT scores related to dropping out. It did, but not as the mismatch hypothesis would predict. "For each 10 point increase in the gap between the individual's SAT score and the institutional average, there was an 8.5% *decrease* in the likelihood of leaving college". *Id.* at 541.

Consistent with these results are findings from Arcidiacono and Koedel's study of students attending schools in Missouri's public university system. *See* Peter Arcidiacono & Cory Koedel, *Race and College Success: Evidence from Missouri,* 6 Am. Econ. J. Applied Econ. 20 (2014). Their data allowed them to link a

student's college performance with the student's high school performance and the quality of the high school attended. They report that, "Moving African American students out of the top colleges and into the moderately selective colleges ["somewhat similar to removing affirmative action at top schools"] has a small, negative effect on graduation rates." *Id.* at 41. They also found that, "At the 90th percentile of the African American distribution the three most-selective colleges have higher graduation rates than the moderately-selective colleges, which in turn have higher graduation rates than the bottom four schools, regardless of initial major."[9] *Id.* at 34.

Faced with studies that consistently fail to find mismatch effects or find that "overmatched" minorities do better than they would without affirmative action, Sander nevertheless sees support for his theories in these studies because, he asserts, they fail to adequately account for selection bias (the possibility that minorities admitted to more selective institutions are academically stronger than their quantitative credentials suggest, and that these unmeasured strengths are why they perform as well or better than similarly credentialed students at less selective institutions). *See* Richard H. Sander & Stuart

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[9] According to the authors the 90th percentile in the African American distribution is at about the 75th percentile of the white distribution.

Taylor, Jr. *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit It* (2012) [hereinafter Sander & Taylor, *Mismatch*]. The argument stinks of the lamp. It undercuts Sander's claim that affirmative action provides a huge race-based boost to minority applicants and is instead consistent with a holistic admissions system that treats an applicant's contribution to racial diversity as one among many factors with admissions relevance.

Sander may be correct in pointing to selection bias as a possible confound, but to require one to rethink the null findings of mismatch research these effects would have to be far stronger than is reasonable to suppose.[10] This is evident from studies that do control for selection bias and report results much like those described above.

Alon and Tienda, for example, used three statistical methods, rooted in different

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[10] Professor Sander once argued that law school admissions is a largely mechanical process, dependent almost entirely on LSAT scores, undergraduate grades, residency (by some schools) and race. If this were true, there would be little room for selection bias. Sander, *Systemic Analysis*, *supra*, at 409-10. (Selection bias might still exist if students saw in themselves academic strengths or weaknesses not reflected in performance measures, were accurate in their assessments, and based on these assessments chose to attend more or less competitive schools. No reported evidence supports these suppositions.)

assumptions, to account for selection on unobservables: propensity scores, matching estimator, and a dummy variable approach. They also examined data not just from the selective schools in the College and Beyond survey, but also from two other representative samples (High School and Beyond and National Education Longitudinal Study [NELS]). Their conclusion—based on diverse data sets and methods, including methods designed to control for selection bias—was that "affirmative action practices both broaden educational opportunities for minority students and enable minority students to realize their full potential." *See* Sigal Alon & Marta Tienda, *Assessing the "Mismatch" Hypothesis: Differences in College Graduation Rates by Institutional Selectivity*, 78 Soc. of Educ. 294, 309 (2005).

Dale and Krueger, focusing on future earnings, controlled for selection bias by restricting comparisons to students comparable on observable variables who were accepted and rejected by a comparable set of colleges.[11] *See*

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[11] A 2002 Dale and Krueger study of 1976 graduates did not find such effects, but too few African Americans were in the sample to reliably show how their earnings were affected. Following the earlier study, prominent proponents of the mismatch hypothesis praised Dale and Kruger's approach, characterizing it as "ideal," Williams, *supra*, at 185, (Williams, *supra* note 14 at 185) and "the most reliable way of measuring mismatch," Sander, *Reply*, *supra*, at 2016. *But see* Caroline Hoxby, *The Changing Selectivity of American Colleges*, 23 J. Econ. Perspectives 95 (2009).

Stacy Berg Dale & Alan B. Krueger, *Estimating the Return to College Selectivity Over the Career Using Administrative Earnings Data*, 49 J. Human Resources 323 (2014). Looking about 14 years after graduation at people who had entered schools much like those in the College and Beyond data, they found that attending more selective schools boosted the earnings of affirmative action minorities, even after adjusting for selection bias. *Id.* at 350. They suggested that this might be because "networking opportunities ... from attending a selective college may be particularly valuable for black and Hispanic students." *Id.* Importantly, the minority's gains did not come at the majority's expense, for the earnings of white students were not depressed when they attended less selective schools.[12]

Melguizo used Dale and Krueger's approach to study college graduation rates rather than future earnings. *See* Tatiana Meguizo, *Quality Matters: Assessing the Impact of Attending More Selective Institutions on*

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[12] Dale and Kruger's results are consistent with earlier analyses by Bowen & Bok, *supra*; Kermit Daniel, Dan A. Black & Jeffrey Smith, *Racial Differences in the Effects of College Quality and Student Body Diversity on Wages*, *in* Gary Orfield & Michael Kurleander, eds., *Diversity Challenged: Evidence on the Impact of Affirmative Action* (2001); Kane, *supra*; Roland G. Fryer & Michael Greenstone, *The Changing Consequences of Attending Historically Black Colleges and Universities*, 2 Applied Econ. 116 (2010).

College Completion Rates of Minorities, 49 Res. in Higher Ed. 214 (2008). Using the nationally representative NELS sample, she found that the "relatively high and positive impact of attending ... highly selective institutions remained significant in the case of minorities." *Id.* at 231. Moreover, Dale and Krueger's approach was only one of several methods she employed to control for selection bias. Summarizing her findings from different approaches, she concluded, "These findings suggest that affirmative action policies are positive not only in terms of increasing the number of minorities enrolled in selective institutions, but also that once there, minorities benefit by having higher probabilities of attaining a bachelor's degree." *Id.* at 232.

A different approach to mitigating selection bias relies on "natural experiments." For example, during the post-*Hopwood*, pre-*Grutter* period, Texas responded to the ban on affirmative action by guaranteeing students in the top 10 percent of their high school class admission to any Texas public university. This allowed Cortes to examine degree attainment by students in the second and third deciles of their high school classes while using top decile students as a control group.[13] *See* Kalena E.

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[13] Another quasi-experiment, using California data, concluded that mismatch "has no reliable or substantively notable bearing on grades, rates of credit accumulation, or persistence," *see* Michal Kurleander & Eric Grodsky, *Mismatch and the Paternalistic Justification for Selective*

Cortes, *Do Bans on Affirmative Action Hurt Minority Students? Evidence from the Texas 10% Plan*, 29 Econ. Ed. Rev. 1110 (2010). She compared African American and Latina/o graduation rates with white graduation rates at six public universities that differed considerably in selectivity: University of Texas (UT) Austin, Texas A&M at College Station, Texas Tech, Texas A&M at Kingsville, UT San Antonio, and UT Pan American. She found that after *Hopwood*, the gap between minority and non-minority graduation rates widened by one fifth. The mismatch hypothesis leads one to expect the opposite. If the hypothesis held, minority graduation rates for second and third decile students should have increased (and racial gaps should have shrunk) post-*Hopwood*, since as beneficiaries of neither affirmative action nor the Ten Percent Plan, lower decile minority students would have been "better matched" to their classmates. Given the findings of so many others, Cortes's summary is hardly surprising,

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College Admissions, 86 Soc. of Ed. 294 (2013). Commenting on *Fisher* I, one of the authors elaborated, "The plaintiffs ... claim that the beneficiaries of affirmative action are ... victims because of mismatch. Our study shows just the opposite; mismatched students are more likely to persist in college at elite UCs and do not pay a penalty in terms of grades for doing so." *See* Daniel Luzer, *Justice Clarence Thomas Worries Affirmative Action Causes a "Mismatch" for College Students, No It Doesn't*, Wash. Monthly (June 27, 2013), http://www.washingtonmonthly.com/college_guide/blog/justice_clarence_thomas_worrie.php.

"I find no evidence in support of the minority 'mismatch' hypothesis." *Id.* at 1111.

C. Professor Sander, although ostensibly writing to aid the Court and on behalf of neither party, cites none of the above studies, nor others that call the mismatch hypothesis into question. Rather he relies on three recent studies to present a pretend consensus on the mismatch issue and support his claim that since *Fisher* 1 "the evidence of [academic] mismatch effects has continued to deepen." Brief Amicus Curiae for Richard Sander in Support of Neither Party at 20, *Fisher v. University of Texas*, (2015) (No. 14-981). One is the article by Williams discussed above and shown to be fundamentally flawed. A second by Scott Carrell et al provides no support for the mismatch hypothesis in the real world of college admissions and was stimulated by observations that undercut rather than support mismatch theory. *See* Scott Carrell, Bruce Sacerdote & James West, *From Natural Variation to Optimal Policy? The Importance of Endogenous Peer Group Formation*, 81 Econometrica 855 (2013).

Carrell et al, who teach at the Air Force Academy, noted that low ability students, as measured by the SAT verbal test, "benefited significantly from being [randomly placed in squadrons] with peers who have high SAT Verbal scores," *id.* at 855, an observation contrary to what mismatch theory would predict. They then designed an experiment to

build on this observation. Following established procedure, one group of incoming cadets (the controls) was assigned randomly to thirty-person squadrons. Other students (the experimental subjects) were assigned to thirty-person "bimodal squadrons." These intentionally contained large numbers of "low skilled" and "high skilled" cadets, as measured by SAT verbal scores. The expectation was that interaction between low and high ability cadets would increase to the benefit of those with low ability. It did not work out this way. Low ability students in the bimodal squadrons ended up with grades that, when compared to control group cadets, were, in the statistical sense, significantly below the grades they were predicted to receive. In retrospect, the authors suggest that in the absence of middle ability students, the concentrations of high ability and low ability students within a small group resulted in interaction patterns that were homogenous with respect to ability levels. The result was that low ability students did not greatly benefit from the concentration of high ability students within their squadrons.[14]

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[14] One cannot conclude that the low ability students failed to benefit from the presence of high ability counterparts because the only control group was heterogeneous with respect to ability. To determine whether low ability students in bimodal squadrons benefited from the presence of high ability squadronmates, one would want a control group composed entirely of low ability students.

Despite Sander's touting, these results tell us little about affirmative action or mismatch in the real world. Minorities who benefit from affirmative action have a range of skill levels, and their white classmates also have a range of skill levels, often including less academically skilled athletes and legacies. Neither minorities nor whites are placed in groups designed to be closely knit but composed of equal numbers of students with skills at the extremes. Moreover, even if the experiment were a test of mismatch, its results should dampen rather than heighten concerns. Not only were differences only marginally significant, not quite reaching the .05 level, but they were substantively of little concern. Carrell et al., *supra*, at 871. The mean decrement associated with bifurcation was .061 or the difference between a GPA of 2.26 and 2.2.[15] As with Williams' work, the thinness of this reed, on which Sander rests his mismatch claim, is telling.

Professor Sander's last thin reed is a forthcoming paper by Arcidiacono and Lovenheim.[16] Peter Arcidiacono & Michael Lovenheim, *Affirmative Action and the Quality-Fit Tradeoff* (Working Paper No. 20-962, 2015).

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[15] *Id.* There was also an interaction with gender. Women's GPAs appeared unaffected by being in a bifurcated group while the decrement for men was almost .1.

[16] The paper is in press. The available web version is dated February 2015.

Professor Sander seeks to convey the paper's message with a single quote:

> The evidence suggests that racial preferences are so aggressive that reshuffling some African American students to less-selective schools would improve some outcomes due to match effects dominating quality effects. The existing evidence indicates that such match effects may be particularly relevant for first-time bar passage and among undergraduates majoring in STEM fields.

Id. at 69. But consulting the original, one sees that Sander terminates his selection at the point where the authors' words serve him best. The passage continues:

> However, shifting minority undergraduates to low-resource non-selective schools ultimately may undo any gains from higher match quality, and shifting minorities out of law schools altogether could lead to worse labor market outcomes among these students than had they been admitted to some law school.
>
> Alternatively, schools that wish to practice extensive affirmative action could provide targeted services to these students in order to overcome any

> mismatch induced by their admission policies, such as offering tutoring and remedial classes. While the evidence on targeted college services is scant, ... such interventions could be successful in mitigating any negative match effects.

Id. at 24. Sander also does not repeat Arcidiocono and Lovenheim's comment that, "A problematic conclusion one could draw from Sander's results is that *everyone* is harmed by going to a more elite law school.... [I]f there are cross-race differences in mismatch effects, generalizing these estimates to a sample of African American students could yield misleading conclusions about the extent of mismatch."[17] *Id.*

Arcidiocono and Lovenheim's contribution does make important points that are seldom mentioned in the empirical mismatch literature. One is that people and situations differ. Even if affirmative action greatly helps minorities as a group, there will be students who would have done better had they gone to less competitive

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[17] The authors follow up by suggesting on the same page that, "[F]or the objectives of maximizing black bar passage, there may be an optimal affirmative action policy that falls in between the current policy and race-blind admissions." Since 1991, when the BPS cohort entered law school, there has been a substantial increase in the entering credentials of affirmative action minorities; so substantial that the authors' "optimal affirmative action policy" may now be the rule.

institutions. By the same token, even if most minority students were harmed by mismatch, some would benefit from attending schools where they might seem overmatched. Wise policy requires empirical insight into where the balance lies. On this point the literature is clear: on average affirmative action helps far more than it hurts.

Arcidiacono and Lovenheim also remind readers that even with perfectly race-blind admissions, minorities will have academic credentials that are disproportionately low for their institutions. This is because the distributions of minority and white test scores (and to a lesser extent grade-point averages) are such that no matter the range examined, African Americans and Latinos within that range will have mean scores below those of their white classmates. An implication is that within-school differences between the mean admissions indices of whites and minorities do not necessarily suggest an admissions system that attends to race, nor do they indicate the extent to which race counts in admissions.[18]

D. Even if the studies that Sander offers to show mismatch were not mischaracterized or seriously flawed, the Court could still be misled

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[18] *See also* William T. Dickens and Thomas J. Kane, *Racial Test Score Differences as Evidence of Reverse Discrimination: Less than Meets the Eye*, 38 Industrial Relations 331 (1999).

if it assumed that statistical significance meant substantive significance. Arcidiacono and Lovenheim, for example, tell us that assuming selection on unobservables does not differ with race, "African American students at selective law schools are about 2.5 percentage points less likely to pass the bar than white students at selective law schools." *Id.* at 27. The difference, even if statistically significant is small, and may be attributable not to affirmative action but to factors like being able to afford a quality bar preparation course. It is also dwarfed by the quality of the law school one has attended. For example, at BPS tier 1 schools, 75% of African Americans with index scores between the 40th and 60th percentile of the African American score distribution pass the bar, as do 92% of those with index scores between the 60th and 80th percentiles, and 90% of those with scores in the top 20% of the distribution. For BPS tier 2 schools the pass rates for students in these quintiles are 54%, 67% and 86% respectively, while for tier 3 schools they are 65%, 77% and 82%. Chambers et al., *supra*, at 1884.[19] A 2.5% decrement vis-à-vis whites is a small price to pay for the bar passage advantage associated with attending an elite school.

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[19] Students in the two lowest quintiles are not included in this analysis because the elite schools had too few low scoring African American students to compute a reliable mean.

Arcidiacono and Lovenheim indicate that their best reading of the BPS studies indicate that a "modest" mismatch effect, one that could be ameliorated by somewhat less aggressive affirmative action, exists, Arcidiocono & Lovenheim, *supra*, at 26, but they also admit that the data may be too noisy and too imprecise to allow any concrete conclusions about mismatch in law schools to be drawn. *Id.* at 28. In fact, even the authors' suggestion of a modest overall mismatch effect overstates what the law school data show. They did not know when they wrote that BPS tier 3 schools were slightly more selective than tier 2 schools and that mean index scores of students in these two tiers were statistically indistinguishable, nor did they consider the finding of Xiang & Rubin, *supra*. Arcidiacono and Lovenheim also ignore reasons why African American students at the HBLS's could be expected to do better in graduation and bar passage than their counterparts at largely white law schools. Moreover, the specific mismatch effects they identify exist only when first-time bar passage is the dependent variable. Not only are people who pass the bar on their second or third try also lawyers, but law graduates with little money or high debt – the situation of many minority students – may be prone to try the bar once without paying for an expensive review course.

There is also a statistical issue these authors ignore. Because Sander and Williams could have claimed support for the mismatch

hypothesis had their measure of mismatch in either their first-time or eventual bar passage equations been significant, they had two opportunities rather than one to find supporting results. The chance that one of two efforts would yield significant results is greater than that indicated by the significance levels they report. There are ways to correct for multiple tests, but they are not employed.

Turning to the undergraduate data, despite Arcidiacono and Lovenheim's seeming unawareness of much of the relevant research, including almost all articles published in sociology and education journals, the authors do not conclude that so-called mismatched minorities are less likely to persist in their studies and gain degrees than minorities who are well-matched to their institutions. Rather they focus entirely on one issue: so-called "science mismatch."[20] There is more to this claim than the general mismatch claim, but not much, and even less that is relevant to assessments of affirmative action.[21]

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[20] Sander in his brief calls this "competition mismatch."

[21] The case for science mismatch effects is weaker than some claim. Not only are effects, if they exist, likely to be small, but even if science mismatch exists, there is reason to suppose that without affirmative action the nation would be producing fewer rather than more well-trained minority scientists. For reasons behind these conclusions, see Richard Lempert, *Affirmative Action in the United States: A Brief Summary of the Law and Social Science* (SSRN, 2015), *available at*

A theme that runs throughout Arcidacono and Lovenheim's commentary is that forces pull in opposite directions. One is the negative effects of mismatch which, with little evidence, they presume exists, and the other is the educational and earnings benefits of attending better resourced, more selective schools. Arcidiacono and Lovenheim argue that affirmative action will be more or less valuable depending on the strengths of these competing pulls and the numbers and types of students affected, but they offer little relevant evidence.

Dillon and Smith, using a nationally representative data set, recently completed a sophisticated econometric study that addresses this issue head-on. Eleanor Wiske Dillon & Jeffrey Andrew Smith, *The Consequences of Academic Match between Students and Colleges* (IZA Discussion Paper, 2015), http://ftp.iza.org/dp9080.pdf. They considered the effects of student ability, college quality, and the interaction between the two on academic outcomes and future earnings and found:

> Both ability and college quality strongly improve outcomes and earnings. We find little evidence to support the "mismatch" hypothesis that college quality and ability interact in substantively important ways.

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http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2541899.

> All students benefit from attending higher quality colleges. Our estimates imply that resorting students to eliminate mismatch, without changing the capacity of any colleges, would raise expected graduation rates by only 0.6 percentage points and mean earnings by $400 per year. The substantial gains for students who move to higher quality colleges under this reshuffling roughly cancel out the losses of students who move down.

Note that they consider both directions in which mismatch can occur, overmatch and undermatch. The tiny gains they find from eliminating mismatch result entirely from increasing the quality level of the schools attended by undermatched students. Overmatched student's (Sander's mismatch) are losers when mismatch is eliminated.

In considering scholarship based on the BPS, the advice that this Court received in *Fisher* 1 from a group that included some of the country's most eminent methodologists, including two members of the National Academy of Science, still stands:

> [Sander's] "mismatch" research fails to satisfy the basic standards of good empirical social-science research. The Sander-Taylor Brief misrepresents the acceptance of his hypothesis in the social-science community and, ultimately, the

> validity of mismatch.... Sander's ... reliance on ... contradictory assumptions lead[s] him to draw unwarranted causal inferences....
>
> In light of the many methodological problems with the underlying research, *amici curiae* respectfully request that the Court reject Sander's "mismatch" research discussed in his Brief ....

Brief of Empirical Scholars, *supra*.

As for the research focusing on undergraduate colleges and post-graduation careers, Matthew Chingos of the Brookings Institution captures the lesson these studies teach:

> [T]he current weight of the evidence leans strongly against the mismatch hypothesis. Most importantly, not a single credible study has found evidence that students are harmed by attending a more selective college. There may well be reasons to abolish or reform affirmative action policies, but the possibility that they harm the intended beneficiaries should not be among them.[22]

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[22] Matthew M. Chingos, *Are Minority Students Harmed by Affirmative Action?* (Brookings Inst. 2013), *available at* http://www.brookings.edu/research/papers/2013/03/07-supreme-court-chingos.

II. UT Austin's holistic admissions system is the most feasible, available option for reducing the isolation of African Americans on campus and attaining important educational goals. At neither UT Austin nor at most schools can class-based preferences, either alone or augmented, replace limited race sensitivity as an effective and efficient instrument for ensuring educationally valuable racial diversity.

A. There are moral and educational reasons why colleges and universities might choose to advantage applicants of lower socio-economic status (SES) in admissions, but these reasons have little to do with maintaining or increasing minority enrollments. The studies that Dr. Kahlenberg cites to support his claim that SES preferences coupled with other proactive efforts can effectively replace race sensitivity in ensuring racial diversity do not bear the weight he puts on them. Unless carefully considered, findings he cites are likely to mislead the Court.

For example, Kahlenberg cites the work of McDuff and Potter to suggest that despite now ignoring race in admissions, the University of Georgia has "met or exceeded levels of racial diversity achieved in the past through the use of racial preferences." *See* Nancy G. McDuff & Halley Potter, *Ensuring Diversity Under Race-Neutral Admissions at the University of Georgia*, in *The Future of Affirmative Action: New Paths To Higher Education Diversity After Fisher v. University of Texas* (Richard D.

Kahlenberg ed., 2014) hereinafter Kahlenberg, 2014) In fact, the proportion of African Americans on Georgia's Athens campus dropped by about 25% between 1995, the last year before Georgia began its transition to a system without racial preferences and 2011. *Id.* at 128. It is true that the number of African Americans attending Georgia rose between these dates, but this is mainly because the total enrollment on the Georgia campus rose by about 1500 students, or almost 41%. African American numbers, however, only increased by about 24 students or 5% when they would have increased by about 180 – also 41% – if African Americans were relatively as successful in securing admissions in 2011 as they had been in 1995.[23] Also contributing to the rise in the number of African American students on campus, and, to an even greater extent to increases in the number of Latino students, are demographic changes that mean these groups constitute an increasing share of Georgia's high school graduates, a fivefold increase in the case of Latinos.

The Georgia experience has added significance because, as Kahlenberg tells us, "the university added to admissions considerations a number of socioeconomic

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[23] *Id* at 129. The 1995 and 2011 enrollment numbers are taken from McDuff and Potter. I calculated the other numbers based on this information. The calculated figures are imprecise because the base numbers were obviously rounded for ease of presentation.

factors (such as parental education and high school environment), began admitting the valedictorian and salutatorian from every high school class and dropped legacy admissions." Richard D. Kahlenberg, *Amicus Brief*, at 19. Thus, despite a much larger student body and demographic changes that favored minority admissions, the kind of broad-based SES plus approach that Kahlenberg says can replace race-sensitive admissions could not stave off a substantial reduction in the proportion of African Americans in Georgia's student body or, most likely, a concomitant increase in the racial isolation of African Americans on campus and in the proportion of classes where African Americans were alone or absent.

What is true of Georgia is true of most of the exemplars referenced in Kahlenberg's brief. Where the numbers of minorities on campuses haven't diminished since affirmative action bans or have slightly increased, neither class-based affirmative action nor heroic efforts at outreach and support tell the whole story. Rather demographic changes coupled with increased class sizes are important explanatory variables. This is true, for example, of Washington and Nebraska, two of Kahlenberg's "success stories." The proportion of African Americans among Washington's high school graduates increased by about 25% over the post-ban period for which there is data, while the comparable increase in Nebraska was about 33%. For Latinos living in states with bans, population gains are often

even greater and far outstrip the proportionate increases of Latinos on the more selective state college campuses. From the perspective of the typical minority high school graduate, the chance of admission to the most selective state schools has dropped post-bans, even if the number of minorities on campuses is little changed. This has happened despite intensive efforts by state flagships to recruit, support and admit minority applicants, including in Washington a special scholarship fund and attention to indicators of social class.

Turning from moderately selective schools in states with bans to the nation's most selective public institutions, that is, schools akin to UT Austin, we see that neither demography nor special recruitment and support efforts have been sufficient to maintain minority enrollments. Kahlenberg himself notes that UCLA, UC Berkeley and the University of Michigan are "outliers," though he unfairly trivializes the efforts Michigan has made to maintain minority enrollments, and he vaguely suggests the top UC system schools could do better despite their use of percent plans, extensive outreach and other measures. He also references a UCLA Law School effort to maintain minority enrollments following Proposition 209 by attention to social class that roughly tripled the proportion of 1Ls who were first in their family to attend college. *See* Richard Sander, *The Use of Socioeconomic Affirmative Action at the University of*

California, in Kahlenberg 2014 at 105. Kahlenberg, however, seems unaware that many, if not most, of the low SES students were children of Asian immigrants, that the UCLA 1L class in 1997 swelled to an unsustainable size, that the number of African American and Hispanic enrollees plunged (in the case of the former to single digits) and that the law school quickly abandoned its class-sensitive approach.[24]

Kahlenberg also places great weight on a simulation by Anthony Carnevale, Stephen Rose and Jeff Strohl, but a close reading of their work suggests it does not serve him well. *See* Anthony P. Carnevale, Stephen J. Rose, & Jeff Strohl, *Achieving Racial and Economic Diversity with Race-Blind Admissions Policy*, in Kahlenberg 2014. Proxying ability by SAT scores, the Carnevale-Rose-Strohl simulation suggests that if admissions officers only considered "ability," African American enrollment at the nation's top 193 colleges would fall by 75%, from 4%, to 1%. Class-based affirmative action softens the blow, but there is still an enrollment drop of 25%. Improvement beyond this level occurs only when a national 10% plan is instituted, and all African Americans who qualify attend one of the 193 schools in the simulation sample. The assumed gains rest on multiple unreal

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[24] Kahlenberg cannot be faulted for ignoring most of these outcomes, since in the essay he relies on, Sander did not mention them.

assumptions: that all qualifying African Americans will attend college and that their college choices will be unaffected by costs, distance from home, preferred majors, social networks, and other considerations. Adding race-sensitivity to the simulation provides, however, evidence for what is well known – the most efficient way to increase racial diversity is race-sensitive admissions.

A simulation co-authored by one of the country's leading statistical methodologists is even more sobering. Using law school BPS data Xiang and Rubin estimate that if class-based affirmative action had replaced race-based affirmative action, the number of African Americans at tier 1 law schools would have dropped from 147 to 29, and their numbers in tier 2 law schools would have fallen from 278 to 141. Xiang & Rubin, *supra* at 302.

None of this is surprising. Although African Americans are more likely than whites to be poor, poor whites far outnumber the poor of other races. Looking at the BPS data, Richard Brooks found that 50.7% of African American law students were in the bottom quartile of the SES distribution while only 22.3% of whites were there. Nevertheless, bottom quartile whites outnumbered their African American counterparts by 5 to 1. *See* Richard Brooks, *Efficient Affirmative Action*, SELA 17 (2005).[25]

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[25]http://www.law.yale.edu/documents/pdf/Efficient_Affirmative_Action.pdf.

Moreover, class-based affirmative action means that if admissions credentials are a valid measure of academic strength, weaker students of all races, will replace stronger ones, with most displacement occurring within the ranks of white students.[26] Roland G. Fryer, Glenn C. Loury and Tolga Yuret, *An Economic Analysis of Color-Blind Affirmative Action*, 24 *J. Law & Econ. Organization* 319 (2008); Brooks, *Id.*; Carnevale et al *supra*. In addition, financial aid will have to swell far beyond what is currently available. For these reasons and more class-based affirmative action cannot substitute for race sensitivity as a means of attaining critical masses of minority students. *See* Maria Cancian, *Race-based Versus Class-based Affirmative Action in College Admissions*, 7 J. Policy Anal. & Management. 94 (1998); Deborah Malamud, *Assessing Class-Based Affirmative Action*, 47 J. Leg. Ed. 452 (1997).

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[26] Colorado researchers who instituted a real world attempt to substitute class-based for race-based affirmative action found that African Americans admitted due to class preferences when they would have been denied using race preferences had particularly low admissions credentials, barely exceeding the threshold for consideration. Although their system allowed Colorado to maintain its historic representation of African American students (fewer than 3%), the authors caution against generalizing their findings to schools in other states, concluding that even using their instrument, class-based affirmative action cannot substitute for race-based affirmative action. Matthew N. Gaertner, & Melissa Hart, *Considering Class: College Access and Diversity*, 7 Harv. L. & Policy Rev. 367 (2013).

A final problem with Kahlenberg's analysis is that he misunderstands the concept of narrow tailoring. He writes as if any race-blind approach that might increase a minority student's chances of college admissions is necessarily a more narrowly tailored way of achieving educationally valuable racial diversity than the kind of race-sensitive holistic admissions employed by UT Austin. But assessing narrow tailoring requires a court to consider a university's entire mission and the most effective and feasible means of simultaneously advancing a range of important educational goals. To the extent that class-based admissions and percent plans favor, as they do, less well-prepared students, both white and minority, over better prepared students, combining these approaches to obtaining a critical mass of minority students must be self-limiting. In a world where few schools can afford need-blind admissions and all schools are struggling to keep costs down, SES-based affirmative action is for cost reasons alone not a feasible general solution. Kahlenberg's attempt to dismiss costs as an issue is a particular weakness of his analysis. *But see Fisher I* 133 S.Ct. at 2420 (race-neutral alternatives should be at a "tolerable administrative expense," quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) at 280 n.6). He cites *Saenz v. Roe*, 526 U.S. 489 (1999), which held that cost could not justify state restrictions on the right to travel, but unlike states, universities cannot

levy taxes. Kahlenberg also suggests that converting merit scholarships to need-based ones would go a long way toward creating financial feasibility. Much merit money is, however, provided by private donors, who could have designated their gifts for needy students but chose not to. Moreover, a university's educational mission is advanced by having a campus richly diverse in a variety of ways. Merit scholarships that attract to campus the science fair winner or the concert pianist contribute to this goal. Rules that would redirect such scholarships to the needy are not more narrowly tailored to a school's educational mission than more efficient, less costly race-sensitive admissions. Nor are limitations on race sensitivity that in practice allow many whites finishing outside of their high school's top ten percent to be considered on a holistic basis while denying most minorities a similar chance good social policy or a Constitutional command. This Court should recognize, as the Fifth Circuit did, that an admissions process does not necessarily become more narrowly tailored to the goal of promoting educationally valuable racial diversity by substituting inefficient proxies for race for the variable of concern.

Race is an inescapable part of personal identity. It affects the survival of a boy sitting on a swing holding a toy gun and of a slightly older youth returning home from a 7-11. It leads police to question a distinguished

professor entering his own home, and means two high earning lawyers are told a condominium is off the market only to learn it was back on the market within hours after they viewed it. It means one 14-year-old caught with marihuana is brought to juvenile court while the other is released to the custody of his parents. And it explains why an African American driving a Cadillac in the largely white neighborhood he calls home is repeatedly stopped and questioned by the police. Almost always the effects of an inability to shed one's racial identity disadvantage minorities, sometimes costing their lives. In one small corner of society, however, race may make up for disadvantage and help minorities in a small way. This is what Petitioner in this case and the briefs I have been reviewing would stop.

CONCLUSION

The evidence shows that race-sensitive admissions have not harmed minorities due to academic mismatch and, that if the goal is to secure a critical mass of African Americans on campuses, SES preferences, even when supplemented by other efforts, cannot effectively replace race-sensitive holistic admissions. Arguments to the contrary by Richard Sander and Richard Kahlenberg do not withstand close scrutiny.

Respectfully submitted,

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